

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

FUYAO GLASS AMERICA, INC.

and

Cases 09-CA-199943
09-CA-201328

INTERNATIONAL UNION, UNITED
AUTO, AEROSPACE, AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA
(UAW)

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO FUYAO GLASS AMERICA,
INC.'S PETITION TO REVOKE INVESTIGATORY SUBPOENA DUCES TECUM

I. INTRODUCTION:

Region 9 of the National Labor Relations Board submits this supplemental memorandum pursuant to the Board's March 20, 2018 letter granting leave to the parties to address the impact of the District Court's action narrowing a similar investigative subpoena that the Region issued to the Charged Party in Case 9-CA-177204. For the reasons stated herein, and in the Region's September 29, 2017 memorandum in opposition to the Charged Party's petition, the Board should deny the petition to revoke the subpoena herein. The District Court's ruling is erroneous and non-binding on the Board. Moreover, the conditions on which the District Court relied in concluding that the Region's subpoena in 9-CA-177204 would unduly burden the Charged Party no longer exist by the Charged Party's own admission.

On August 31, 2017, the Region issued Subpoena No. B-1-Y1L71R seeking certain records relevant to its investigation of charges filed by the International Union, United Auto, Aerospace, Agricultural Implement Workers of America (UAW or Charging Party), alleging,

inter alia, that employees were disciplined and terminated because of their union activities. The subpoena sought:

1. All disciplinary actions for attendance, including discharges, for the period February 2, 2017 to April 30, 2017, for employees in the Lamination and ARG Departments.
2. For the employees who were discharged for the period from February 2, 2017 to April 30, 2017, any discipline that they received for attendance during the 12-month period preceding their discharge.
3. Documents that show the attendance points of employees in the Lamination and ARG Departments for the period February 2, 2017 to April 30, 2017.

On September 12, Fuyao Glass America, Inc. (Employer) filed its petition to revoke the subpoena, claiming that the subpoena is overly broad and unduly burdensome. On September 29, the Region filed its memorandum in opposition to the petition to revoke.

II. ARGUMENT:

The Board should apply the same, and proper, standard that it applied to the petition to revoke in 9-CA-177204 and deny the Charged Party's petition to partially revoke the subpoena herein, notwithstanding the District Court's erroneous decision. In Case 09-CA-177204, the Region had sought attendance and disciplinary records for employees working in the same department as the alleged discriminatee. When the Employer refused to provide the requested documents, the Region issued an investigative subpoena, to which the Employer filed a petition to revoke. The Board denied the Employer's petition to revoke, reasoning that the "subpoena seeks information relevant to the matters under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations." The records sought herein also touch on a matter under investigation and are described with sufficient particularity. The District Court's decision

regarding the subpoena in Case 09-CA-177024 curtails the broad investigative power granted to the Board under the Act and is erroneous and nonbinding in this current investigation.

The Board should apply its nonacquiescence policy to the District Court's decision declining to fully enforce the subpoena. The Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision, but will instead respectfully regard such a ruling as the law of that particular case. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), rev'd. 60 F.3d 1195 (6th Cir. 1995). However, even assuming that the District Court's decision carries some precedential weight, the purported conditions warranting its conclusion that the Region's subpoena unduly burdened the Charged Party no longer exists. Namely, the District Court relied on the Charged Party's claim that its personnel and attendance matters, including whether to issue progressive discipline, rested with individual supervisors and were not centralized. See Decision and Entry of District Court, page 5. However, that is no longer the case as of around July 2016. See, *Ibid.* Indeed, by the Charged Party's own representations in the instant investigation, many of the difficulties that caused the Employer to object to the Region's earlier record requests appear to have been alleviated by technological improvements in its attendance and record-keeping.

Moreover, there is evidence corroborating the Charged Party's representations in the District Court proceedings that it was the Charged Party's Human Resources Department, rather than the front line supervisors, who were, and are now, responsible for making the personnel decisions concerning the discipline and termination for attendance during the time period covered by the subpoena herein. Therefore, a narrower set of documents limited only to the

records of employees working under the same front-line supervisor as the alleged discriminatees unnecessarily restricts access to relevant documents.^{1/}

For these reasons and for the reasons argued in the Region's September 29 memorandum, the Region respectfully requests that the Employer's petition be denied.

Dated: April 3, 2018

/s/ Joseph F. Tansino

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Attachments

¹ / The Region would add that subpoena is focused on a relatively brief 3- month time period, further undermining the Charged Party's claim that the subpoena is burdensome or overly broad.

CERTIFICATE OF SERVICE

April 3, 2018

I hereby certify that I served the attached Memorandum in Opposition to Fuyao Glass America, Inc.'s Petition to Revoke Investigatory Subpoena Duces Tecum on all parties by serving copies thereof by electronic mail today to the following at the addresses listed below:

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